

In re ) Fair Hearing No. 9166  
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Appeal of )

The petitioner appeals the decision by the Department of Social Welfare denying his application for Medicaid. The issue is whether the petitioner is disabled within the meaning of the pertinent regulations.

1. The petitioner is a 41-year-old male with an eleventh grade education. He has an uninterrupted history of full-time and well paid employment from 1968 to 1987 as, first, a meat cutter for 15 years and, then, as a long distance truck driver for 4 years.

2. As a meat cutter, the petitioner was required to stand or walk for 8 hours per day, to frequently lift over 50 pounds and to occasionally lift up to 180 pounds. In 1983, the petitioner began to experience back pain which he thought might be related to a bullet wound he received in his spine some 25 years earlier as the result of a hunting accident. Because he was unable to stand or walk without a good deal of pain, he decided to quit his job in late 1983 and get a job as a truck driver.

3. In early 1984, the petitioner got a job as a large

rig, long distance truck driver which required him to lift 50 pounds frequently and occasionally up to 100 pounds and to sit for 8 hours per day during hauls of 400 - 500 miles. Initially, the sitting posture gave him some relief from his back pain but it soon worsened to the point where the petitioner had to make frequent stops to lie down in the cab due to pain. By June of 1987, the petitioner's level of pain made it impossible for him to continue his day long driving so he could not continue his employment.

4. At the time the petitioner quit his last job in June of 1987, he was unable to sit for more than a few minutes without pain and the need to change positions, unable to walk more than a few feet without pain, and unable to lift more than ten pounds without pain. He had difficulty sleeping at night due to pain and gets no relief from medication or exercises.

5. The petitioner's pain has progressively worsened since that time to the point that the pain now radiates into his feet making his gait shaky and causing him at times to have to crawl in order to get to the bathroom. His pain is constant and occurs even without movement, although movement intensifies it. The petitioner lives with a friend and prepares his own simple microwave dinners from food he buys at a grocery store where he is taken by his brother. He no longer drives or walks and finds himself always short tempered and irritable. He no longer hunts, fishes or goes for walks and spends his days reclining to get comfortable

and watching TV. Since June of 1987 he has attempted on three or four occasions to earn money (up to \$150 per day) by driving a truck again for his former employer but was unable to sustain that activity due to pain. The petitioner's great desire to return to work was both palpable and credible.

6. The medical evidence shows that the petitioner was first examined by a doctor for back pain in December of 1987, about six months after he quit his job. That examination revealed no particular neurological abnormalities but his complaints of pain were noted. This pain was attributed to "lumbosacral strain" and the physician thought that after a series of flexion extension exercises he could return to light or sedentary work. Almost one year later in November of 1988, he was again examined by another physician who could find no neurological abnormalities and who also felt that the petitioner might be suffering from lumbosacral strain. Her report noted that the petitioner reported constant back pain radiating down into his left leg. Neither physician had X-rays made of the petitioner's spine.

7. In March of 1989, the petitioner was referred to an orthopaedic specialist at a teaching hospital who examined him, ordered X-ray tests and concluded that he suffered from inflammation of a vertebral disc of the lumbar spine, ("unilateral spondylolysis"). He noted the patient's complaint of chronic lower back pain radiating into his

thighs to the knees. The petitioner was told to perform no activity to stress the lumbar spine, to wear a support, to do exercises and to take anti-inflammatory medication.

8. In June of 1989, the petitioner returned to the orthopaedic specialist because the pain had not abated and was now radiating into his feet. He was using a crutch at that time and continues to do so. Upon examination, the petitioner was found to have severe deficits in the range of motion and strength in his legs, as well as a loss of sensation. He was referred by that physician to a neurologist who found no neurologic involvement but who made similar findings upon exam and agreed with the orthopaedist that the severity of his pain indicated that new X-rays should be made. Those X-rays showed that the petitioner had a herniated nucleus pulposus of the L5-S1 vertebrae which was labeled "significant with displacement of the left sided nerve root and obliteration of epidural fat." A second herniated disc was found at the L4-5 vertebrae which was described as mild.

9. Although the petitioner indicated at hearing that he is planning to have disc surgery, there is no medical evidence whatsoever in the file to indicate what surgery is planned, what the expected results might be, and if and when the petitioner might be able to engage in any work activities following surgery.

10. Based on the above evidence, it is further found:

(1) that from June 1987 to the present time, the petitioner has been consistently unable to walk, stand

or sit for more than a few moments each without considerable pain or to lift more than ten pounds without severe pain to his back; and;

(2) that there is no evidence that the petitioner's condition is likely to improve to the point of ability to engage in sustained work activities either with or without medical intervention (i.e. surgery or drug therapy).

ORDER

The department's decision is reversed.

REASONS

Medicaid Manual Section M211.2 defines disability as follows:

Disability is the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment, or combination of impairments, which can be expected to result in death or has lasted or can be expected to last for a continuous period of not fewer than twelve (12) months. To meet this definition, the applicant must have a severe impairment, which makes him/her unable to do his/her previous work or any other substantial gainful activity which exists in the national economy. To determine whether the client is able to do any other work, the client's residual functional capacity, age, education, and work experience is considered.

The documentary evidence in this case alone shows quite clearly that the petitioner has a seriously debilitating medical problem which causes him great pain and which has prevented him from performing even simple movements for at least two years. There is nothing in the medical evidence from which it could be concluded that the petitioner's condition will improve. That being the case, the petitioner should have been found eligible in the first instance by DDS because he is presently unable to engage in any substantial gainful activity by reason of his disc disease and that

condition has already existed for at least twelve months and is expected to continue indefinitely into the future.

DDS's inexplicable unwillingness to credit the petitioner's pain complaints which were well corroborated by his physicians all along, caused the petitioner the unnecessary and obviously stressful experience of attending a hearing and being questioned while in great pain. This man should have been in an operating room, not a hearing room. DDS must become sensitive to the real and extreme repercussions such a sloppy decision has on a person's life.

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Although the petitioner is optimistic that surgery will enable him to eventually return to work (and he is wished great luck in this regard), if he finds that not to be the case he is strongly urged to apply for Social Security benefits and contact either legal aid or a private attorney to assist him immediately with an appeal if he is denied. (DSW may want to consider helping the petitioner to obtain able counsel as he is currently relying on the State for assistance--G.A. and Food Stamps). With his long and prosperous work history, he may be eligible for a sizable benefit. He also has unusually strong "objective medical evidence" of his back problem to back up his pain claim which (with the help of a persuasive attorney and possibly a federal judge) should even convince the usually skeptical Social Security Administration of his inability to work.

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